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## Cross-Border Gaming: The European Regulatory Perspective

THIBAUT VERBIEST and EWOUT KEULEERS

### INTRODUCTION

CONSIDERING ITS SUBSTANTIAL economic importance<sup>1</sup> the European Commission demonstrated in the early 1990s a certain interest<sup>2</sup> in the "gaming sector." The Member States, however, held the firm opinion, based upon the principle of subsidiarity, that the regulation of casino games, lotteries and other types of games was an exclusive Member State matter.

Having considered the remarks brought forward by the Member States, the Commission underlined in 1992 that, even if a legislative initiative was not required, this could not be excluded. It stated that "as the Community becomes ever more closely integrated, and technological developments open up markets worldwide, it can not be precluded that the Commission will have to reconsider its position in view of new and as yet unforeseeable trends."<sup>3</sup>

One of those "unforeseeable trends" could well be the dawning of the information society, most manifestly demonstrated by the growth of the Internet, a society, as we all know, without geographical frontiers.

In this article, our objective is to analyze to what extent gaming operators can engage in cross-border activities. While European competition law<sup>4</sup> can be of importance, our focus

will be on the free provision of services and goods throughout the European Union, as clarified by the relevant jurisprudence of the European Court of Justice.

Once the limits to this freedom have been analyzed, the impact of the rise of the information society, and the underlying opportunities, will be analyzed.

### *The freedom to provide services*

To create an integrated single European market five basic principles were inscribed in the European Community Treaty (EC Treaty).<sup>5</sup> Besides the right of establishment,<sup>6</sup> the free move-

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<sup>1</sup> See EU Institutions press releases, IP (91)904, October 11, 1991.

<sup>2</sup> COOPERS & LYBRAND EUROPE, GAMBLING IN THE SINGLE MARKET—A STUDY OF THE CURRENT LEGAL AND MARKET SITUATION (1991).

<sup>3</sup> EU Institutions press releases, IP (92)1120, December 23, 1992.

<sup>4</sup> See, e.g., Article 86 of the European Community Treaty. In this regard reference can be made to the jurisprudence of the European Court of Justice, Case C-83/98 P, French Republic v. Ladbroke Racing Ltd and the Commission, 2000 OJ C 223; Joined Cases C-359/95/P and C-379/95, Commission and French Republic v Ladbroke Racing Ltd, 1997 ECR I-6265; and the European Court of First Instance, T-67/94, Ladbroke Racing Ltd v Commission, 1998 ECR II-1.

<sup>5</sup> Treaty Establishing the European Community, Rome, March 25, 1957 [hereinafter the EC Treaty].

<sup>6</sup> Article 43 EC Treaty (ex article 52):

Within the framework of the provisions set out below, restriction on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any other Member State.

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ment of persons<sup>7</sup> and capital,<sup>8</sup> the free movement of goods,<sup>9</sup> and the free movement of services were inscribed in Article 49 of the EC Treaty.

Article 49 of the EC Treaty states that:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.<sup>10</sup>

With some exceptions, which will be commented on later, this article basically guarantees the cross-border provision of services throughout the European Union. By virtue of this principle of freedom, a UK bookmaker should be allowed to deploy his activities on, for example, the Italian gaming market.

At the time the European Commission unfolded its intention to adopt a European gaming regulation, none of the Member States regarded gaming activities as regular economic

activities and therefore the principles laid down in the EC Treaty were considered non-applicable.<sup>11</sup> In the meantime, however, the European Court of Justice has formally recognized that there is no reason for not considering those activities as economic activities.<sup>12</sup>

The freedom to provide services or goods throughout the European Union is one of the main drives behind the European integration. However, this freedom is not an absolute one. In order to know to what extent Member States may enact restrictive measures, one should not only consider the limits set out in the EC Treaty, but also the jurisprudence of the European Court of Justice.<sup>13</sup>

### THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

In the previous decade, the EC Court ruled three times upon the compatibility between the European Law and restrictive regulation of the Member States in the field of gaming activities.<sup>14</sup>

Although the facts differ from case to case,

<sup>7</sup> Article 39 EC Treaty (ex article 48):

Freedom of movement for workers shall be secured within the Community.

Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

<sup>8</sup> Article 56 EC Treaty (ex article 73b):

Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

<sup>9</sup> Article 30 EC Treaty (ex Article 36):

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial

property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 28 EC Treaty (ex article 30) states that quantitative restrictions on imports and all measures having equivalent effect is prohibited between Member States.

Article 29 (ex article 34) states that quantitative restrictions on exports, and all measures having equivalent effect, is prohibited between Member States.

See also the decisions of the European Court of Justice; Case C-8/74, *Dassonville*, 1974 ECR 837; Joined Cases C-267/91 and C-268/91, *Keck & Mithouard*, 1993 ECR I-6097.

<sup>10</sup> Article 49 EC Treaty (ex article 59).

<sup>11</sup> *Cf. infra* text accompanying notes 21–26.

<sup>12</sup> See Case C-275/92, *Her Majesty's Customs and Excise / G. Schindler and J. Schindler*, paragraphs 16–20, 1994 ECR I-1039, paragraphs 16–20.

<sup>13</sup> Hereinafter referred to as the EC Court.

<sup>14</sup> Case C-275/92, *Her Majesty's Customs and Excise v. G. Schindler & J. Schindler*, 1994 ECR I-1039 [hereinafter *Schindler*]; Case C-124/97, *Markku Juhani Läära, Cots-wold Microsystems Ltd, Oy Transatlantic Software Ltd. v. Kihlakunnansyyttäjä, Suomen Valtio*, 1999 ECR I-6067 [hereinafter *Läära*]; Case C-67/98, *Questori di Verona v. D. Zanatti*, 1999 ECR I- 7289 [hereinafter *Zanetti*].

the underlying issues remain the same. Therefore, the European Court of Justice reaffirmed its *Schindler*<sup>15</sup> rule in the *Zenatti*<sup>16</sup> and *Läära*<sup>17</sup> cases.

The court followed the principles laid down in its *Schindler* ruling for several reasons.<sup>18</sup>

In the first place, while the concepts of "lottery," "casino game," "sports bet," etc. can have a different meaning from one Member State to another,<sup>19</sup> European Law does not have its own definition of "gaming activity." A "game" is deemed to be any activity involving a certain amount of chance, a stake, and a prize or economic value.<sup>20</sup> If these three criteria are present, the EC Court considers the activity to be a "gaming activity." In the second place, and recognizing the diversity of the gaming concept at Member State level, the EC Court made an abstraction of that diversity by stating that those activities had the same consequences. Therefore, they should be submitted to the same treatment. Finally, the underlying questions were the same: are Member states under European Law allowed to restrict, or even prohibit, the cross-border provision of gaming-related activities?

Consequently when assessing the compatibility between a restrictive Member State regulation and the free provision of services and goods, the European Court had to answer five questions.

*Does the regulation concerned relate to an economic activity?*

The answer to this question is of paramount importance. In principle, the EC Treaty will only apply to economic activities. The European integration, however, embraces more than economics.

If the answer to this question were a negative one, as some of the Member States advocated, then the EC Court would not need to look into the question whether national restrictions can be conciliated with the legal principles of European Community Law.<sup>21</sup>

The EC Court, however, held that the Member States did not bring forward cogent arguments to narrow the scope of the EC Treaty. Besides, it was evident from the facts of the cases, as they were presented to the EC Court, that

the economic significance of gaming activities was considerable in all the Member States. The arguments that gaming activities are recreational or playful activities, or that they are entrusted to public undertakings for public-interest purposes,<sup>22</sup> were not upheld by the EC Court.

Furthermore, the Belgian and Luxembourg government<sup>23</sup> invoked Directive 75/368.<sup>24</sup> By means of transitional measures, this Directive

<sup>15</sup> *Schindler*, Case C-275/92.

<sup>16</sup> *Zenatti*, Case C-67/98.

<sup>17</sup> *Läära*, Case C-124/97.

<sup>18</sup> See *Läära*, paragraphs 15 and 21; *Zanatti*, paragraph 16 states: "even though the *Schindler* Judgment concerns the organisation of lotteries, those considerations can also apply, as is clear also from the very paragraph 60 of that judgement, to other comparable forms of gambling."

<sup>19</sup> In this regard, reference could be made to the concept of "game" in Sweden and Belgium. In Sweden an activity is considered a lottery under the Lotteries Act of 9 June 1994, as modified, if it is gaming activity that does not fall under the definition of casino game as established by the Casino Act of 3 June 1999. In view of this open concept of lottery, authorities do not encounter great difficulties with the qualification of a game. See Lotteriinspektionen, the Swedish Gaming Authority, (<http://www.lotteri-insp.se>).

The Belgian regime, on the contrary, is a legal patchwork consisting of three different acts, each with its own field of application and definitions, rendering the distinction between a casino game, lottery, or betting activity complex and rigid.

For an overview of French and Belgian gaming legislation, see Thibault Verbiest, *Internet gambling: The European legal framework*, January 2, 2001, available at (<http://www.droit-technologie.org>).

Another example of such diversity can be found in the United Kingdom's gaming legislation, as described in detail in the Gambling Review Report of 17 July 2001, also known as the Budd Report [hereinafter the Budd Report].

<sup>20</sup> See *Läära*, at paragraphs 17–18.

<sup>21</sup> See notably the *Walrave* Case, C-36/74, *Walrave*, 1974 ECR I-1405, and *Donà v Mantero*, Case C-13/76, *Donà v Mantero*, 1976 ECR I-1333, decisions in which the court held that certain sports activities were not of an economic nature and therefore not covered by the EC Treaty.

<sup>22</sup> *Schindler*, paragraph 35. In *Schindler*, Advocate General Gulmann pointed out that the fact that the allocation of profits for public interest purposes did not alter the economic character of an activity. However, this argument is significant when assessing whether the adoption of a restrictive measure is justified, cf. *infra* text accompanying notes 39–44.

<sup>23</sup> See *Schindler*, at paragraph 16.

<sup>24</sup> Council Directive 75/368/EEC of 16 June 1975 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various services, *Official Journal* L 167, June 30, 1975, P. 0022–0028. This Directive is no longer in force.

favors the pursuit of specified activities by self-employed persons. Although gaming activities organized by public undertakings are excluded from the scope of this Directive, it would be rash to conclude that Community law as such is not applicable to gaming activities.

Finally, the economic nature of gaming activities was not altered because, as in most of the Member States, gaming was considered unlawful.<sup>25</sup> In this regard, the EC Court held that even if the morality of gaming activities is questionable, it was not up to the court to pronounce itself over more permissive Member States regulations, where such activities can be practiced legally.<sup>26</sup>

*Does the economic activity relate to the free provision of services or the free provision of goods?*

The distinction between goods and services is one that is not always easy to make. Throughout its case-law, the EC Court has adopted the *accessorium sequitur principale* principle, by virtue of which the nature of an activity is determined by the nature of the principal activity.<sup>27</sup>

In *Schindler*, the court held that sending advertisements and application forms had to be considered as specific steps in the organization of a lottery and could not as such be considered to be the final objective of that activity.

Furthermore, and although in both the *Schindler* and *Läärä* cases goods<sup>28</sup> were involved, the EC Court ruled that the activities at issue were those which provided for remuneration by an operator to enable persons to participate in a game of chance with the hope of winning. For that reason and by virtue of Article 50 of the EC Treaty, they had to be considered as services.<sup>29</sup>

In *Läärä*, the EC Court held that "in those circumstances, games consisting of the use, in return from money payment, of slot machines such as those at issue in the main proceedings, must be regarded as gambling, which is comparable to the lotteries forming the subject of the *Schindler* judgment."<sup>30</sup>

Contrary to *Schindler*, the *Läärä* slot machines themselves are goods within the strict meaning of Article 30 of the EC Treaty. Although this article could be applicable, the court concluded that it did not have sufficient information re-

garding the effects of the adopted restrictive measure.<sup>31</sup> Therefore the EC Court ruled that it was not able to answer the question whether the national measure was incompatible with Article 30 of the EC Treaty.

*If there is a restriction in place, is it discriminating?*

By virtue of Article 49 of the EC Treaty,<sup>32</sup> Member States may only impose and maintain restrictions which do not discriminate on grounds of nationality or residence.

This prohibition not only relates to a direct or indirect discrimination against foreign services provided on the national market, but can also relate to the adoption of non-discriminatory rules for foreign services.<sup>33</sup> As such, in its *Saeger* decision, the EC Court held that Article

<sup>25</sup> See Case C-294/82, *Einberger v Hauptzollamt Freiburg*, 1984 ECR I-1177 (EC Court's decision regarding drugs).

<sup>26</sup> See Case C-159/90, *Society for the Protection of Unborn Children Ireland v. Grogan*, 1991 ECR I-4685, paragraph 20 (EC Court's decision regarding abortion).

<sup>27</sup> See Case C-326/88, *GB-INNO*, 1990 ECR I-667. This case concerned advertisements for goods within the meaning of Article 30 of the EC Treaty. See also the court's *Familiapress* decision regarding competitions published in magazines in the form of crosswords and puzzles giving readers the possibility to win something. Case C-368/95, *Verenigte Familiapress Zeitungsverlags und -vertriebs GmbH v Heinrich Bauer Verlag*, 1997 ECR I-3689.

<sup>28</sup> Lottery tickets and slot machines.

<sup>29</sup> Under Article 50 of the EC Treaty (ex article 60) these activities must be considered as services, because they are services that are normally provided for remuneration, insofar as they are not governed by the provisions relating to the freedom of movement of goods, capital, and persons.

<sup>30</sup> *Läärä*, at paragraph 18.

<sup>31</sup> In *Läärä* the public *Raha-automaattiyhdistys* (RAY), the Association for the Management of Slot Machines, was granted an exclusive right to manufacture and sell slot machines.

<sup>32</sup> Article 49 EC Treaty (ex article 59) states:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of member States who are established in a State of the Community other than that of the person from whom the services are intended.

<sup>33</sup> See Case C-110/78, *Ministère Public v. Van Wesemael*, 1979 ECR I-35; Case C-279/80, *Webb*, 1981 ECR I-3305; The "Tourist Guide cases": Case C-154/89, *Commission v. France, Italy and Greece*, 1991 ECR I-659, and Case C-180/89, *Commission v. Italy*, 1989 ECR I-709.

49 of the EC Treaty not only precludes the adoption of discriminatory provisions on the ground of nationality, but also impedes the activities of a service provider established in another Member State where he is authorized to provide that service.<sup>34</sup>

In all three cases, the court ruled that the regulations at issue were applicable without discrimination on grounds of nationality.

In addition, Advocate General Gulmann gave a broader interpretation of the concept of "discrimination."<sup>35</sup>

Gulmann also considered the fact that the concerned restrictive measure, established by the 1976 Lotteries and Amusement Act as amended by 1993 National Lottery Act,<sup>36</sup> only related to nationwide lotteries and was not applicable to small scale lotteries. However, the court held that the fact that the United Kingdom's legislation<sup>37</sup> in the field of gaming activities differed from one gaming activity to another was not discriminatory because, in the first place, it requires a comparison between economic operators in a non-comparable situation<sup>38</sup> and, in the second place, such a comparison implies that attention should be paid to the proper objectives, rules, and methods of the operators involved.

### *Is the restriction justified?*

Even if Member States have adopted non-discriminating restrictive measures, these have to be justified by the derogations, explicitly provided for by the EC Treaty, and must be necessary and proportioned to the pursued objective. This requirement is also known as the rule of reason. In that respect, Member States may, under Article 46 of the EC Treaty,<sup>39</sup> enact restrictive measures on grounds of public policy, public security, or public health.

These so-called socio-economic reasons are threefold and out of principle have to be considered as a whole.<sup>40</sup>

In the first place, Member States can adopt restrictions on gaming activities for what could be called a responsible gaming policy, *i.e.*, to limit the exploitation of human passion for gambling. Throughout history, various forms of gaming and gambling have attracted mankind. To curtail the negative, mostly social and financial, consequences of excessive gam-

bling, and as such protect the *homo ludens* against its own weakness, restrictions on both the supply<sup>41</sup> and demand sides are justified.<sup>42</sup>

In the second place, taking into consideration the enormous amounts of money involved, gaming activities can be associated with organized crime, *e.g.*, money laundering or even tax evasion. In addition and in connection with consumer protection, it is conceivable that criminal organizations mount up gaming activities for fraudulent purposes.

Finally, and although the EC Court held that it could not be considered as an independent justification, the argument concerning the allocation of profit from gaming activities to charity or other public interest purposes is not without relevance.

On various occasions, the court held that the freedom to provide services throughout the European Union may be overridden to safeguard the well-being of consumers, in particular the recipients of a service, and more generally to guarantee order in society.<sup>43</sup>

<sup>34</sup> See Case C-76/90, *Saeger v. Denemeyer*, 1991 ECR I-4221, paragraph 12.

<sup>35</sup> See Opinion of A.G. Gulmann, at paragraphs 68–76.

<sup>36</sup> The 1976 Lotteries and Amusement Act, as modified, grants the exclusive concession to organize national lotteries to an operator under public control, with allocation of profits for public purpose reasons.

<sup>37</sup> See the Budd report, *supra* note 19.

<sup>38</sup> Under the 1976 Act all sorts of small scale lotteries, *e.g.*, lotteries organized on behalf of certain societies or promoted by local authorities, are allowed.

<sup>39</sup> Article 46 EC Treaty (ex article 56):

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

<sup>40</sup> See Schindler, at paragraph 58. However, Advocate General Gulmann could not preclude that these arguments when considered separately, would not justify the restriction imposed. See Schindler, opinion of A.G. Gulmann, at paragraph 92.

<sup>41</sup> For example, granting exclusive licenses to certain qualified operators or by prohibiting certain games.

<sup>42</sup> For example, denying certain categories of persons, *i.e.*, under-age persons, access to gaming facilities.

<sup>43</sup> See Joined Cases C-110/78 and C-111/78, *Ministère public v. Van Wesemael & Follachio*, 1979 ECR I-35, paragraph 28 ; Case C-220/83 *Commission v. France*, 1986 ECR I-35, paragraph 20 ; and Case C-15/78, *Société Générale Alsacienne de Banque v. Koestler*, 1978 ECR I-1971, at paragraph 5.

In *Schindler*, where these arguments were developed for the first time in connection with gaming services, the court concluded that in the absence of any Community legislation, it was up to each of the Member States to consider what should be appropriate to protect their internal social order.<sup>44</sup>

*Is the restriction necessary and proportionate?*

Following the jurisprudence of the EC Court, it not only is necessary that obstacles to the free provisions are justified by reasons of public policy, but also that the adopted measure is required to guarantee the achievement of the intended aim and is proportionate to that aim, i.e., may not go further than necessary.<sup>45</sup>

In the *Schindler* case, Advocate General Gulmann could not have reflected better the paramount importance of this question in paragraph 79 of his opinion:

The decisive questions are thus in my view in any event whether the interest of society invoked by the States are so fundamental that in the area in question they can justify the existing restrictions and whether the rules in question are objectively necessary in order to achieve the objective pursued and are also reasonable in relation to that objective.

Contrary to the opinions of the Advocates General, the European Court of Justice upheld in all three cases a similar answer to this question.<sup>46</sup> In the court's opinion it is up to the Member States individually to assess, based upon their social model, what kind of measures should be imposed to maintain order in society. The mere fact that one Member State prohibits certain gaming activities, while another Member State advocates a less restrictive regime, for example, by granting a limited number of licenses, does not necessarily imply that the more restrictive measure is disproportionate in relation to the objective pursued or not necessary.

In *Zanetti*, however, the court stressed that it could only allow such a restriction if the legal disposition imposing the restriction *de facto* corresponds to the stated objectives.<sup>47</sup> Therefore, when a Member State evokes the protec-

tion of consumers to justify a restrictive measure and no legal disposition concerning that objective has been inserted in the legal instrument imposing such a restriction, this could mean that the restriction would not stand the test of criticism.

While the jurisprudence of the court is consistent on this point, it should be underlined that the opinions of the Advocates General differ in each of the three cases.

In *Schindler*, A.G. Gulmann reasoned that, in view of the unknown implications of an open and competitive gaming sector, it was not possible to identify less restrictive measures for achieving the pursued objectives.<sup>48</sup>

Advocate General Fennelly partially agreed with A.G. Gulmann's opinion, but added that it was for the national court to consider whether those two conditions were met.<sup>49</sup>

Contrary to the quoted opinions and decisions, it was Advocate General La Pergola's opinion that the Finish law, granting the RAY an exclusive right on gaming machines, did not meet the criterion of proportionality. However the EC Court saw it differently and did not follow this opinion.

*Preliminary conclusion*

To summarize, it can be said that:

- The EC Treaty principally guarantees the free provision of services, including gaming services, in the European Union.
- The European Court of Justice has recognized that, considering the proper nature of cross-border gaming services, Member States have wide discretionary competences to restrict the free provision thereof.

<sup>44</sup> See *Schindler*, at paragraph 61; *Schindler*, opinion of A.G. Gulmann, at paragraphs 101–102.

<sup>45</sup> See Joined cases C-369/96 and C-376/96, *Arblade*, 1999 ECR I-8453, at paragraph 33; Case C-58/98, *Corsten*, 2000 ECR I-7919, at paragraph 33; Case C-361/98, *Italy v. Commission*, 2001 ECR I-385, at paragraph 33; Case C-8/74, *Procureur du Roi v. Dassonville*, 1974 ECR 837; Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda v. the Netherlands*, 1991 ECR I-4007, at paragraphs 13–15.

<sup>46</sup> See *Schindler*, at paragraphs 61–62; *Läärä*, at paragraphs 35–36; *Zanetti*, at paragraphs 33–34.

<sup>47</sup> See *Zanetti*, at paragraph 36.

<sup>48</sup> See *Schindler*, at paragraph 126.

<sup>49</sup> See *Zanetti*, at paragraph 31–32.

Nevertheless, opinions have been evolving since then, driven by the dawning of the information society.

In the first place, it should be emphasized that the cases submitted to the EC Court's jurisdiction did not relate to e-gaming services. At this moment, the first case relating to an e-gaming service is pending before the EC Court.<sup>50</sup> When ruling on this case, the EC Court will have to take into consideration the borderless character of e-gaming services and the concerned regulation of the information society.

Indeed, considering the consequences of their borderless nature, national regulators will be more frequently confronted with the cross-border provision of goods and services. Therefore, the future development of the information society requires some cooperation between and/or integration of the concerned sectors and their regulation.<sup>51</sup> While at the beginning of the last decade of the 20<sup>th</sup> century, the Commission, when declaring that it would not take an initiative, made it clear that this would be an option for the future.<sup>52</sup>

Therefore, and although no proper initiative has been announced in this field, it is clear that such an initiative can no longer be put aside. In addition, with the development of the information society, some directives and programs have been adopted that have made an indirect impact on the e-gaming sector.

### FUTURE DEVELOPMENTS: THE RISE OF THE INFORMATION SOCIETY

As indicated before, when the European Commission first addressed a European gaming regulation, it concluded that there was no need for EU wide regulation. It declared, however, that in the future, this was not to be excluded.<sup>53</sup>

This was reaffirmed by Commissioner Monti's response to a question raised by an EP member J. Cushman, stating that the provision of e-gaming services throughout the European Union would become a European issue.<sup>54</sup>

For that reason and in order to anticipate future developments, one should consider the European regulatory framework of the information society.

### *The Internal Market Strategy for Services*

In the first place, on December 29, 2000 the European Commission published the Internal Market Strategy for Services.<sup>55</sup> The final objective of this initiative is to remove all remaining barriers to services in the Internal Market. This will allow services to move across national borders as easily as within a Member State.

The Communication sets out a two-step approach to achieve this objective. Initially, the Commission had to identify by the end of 2001 the existing barriers to the free movement of services across national frontiers. In a second phase, which had to come to an end by December 2002, the Commission was supposed to bring forward a package of initiatives dismantling the identified barriers.

Although the roll-out of the Action Plan has

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<sup>50</sup> Case C-243/01, Piergiorgio Gambelli. This case concerns a local Italian operator, Piergiorgio Gambelli, who made available the required material to connect gamblers to the website of the UK based virtual bookmaker Eurobet. The lower court of Santa Maria Capua Vetere (Italy) refused to condemn Gambelli for infringing the 1989 Act concerning betting and gambling activities on sports competitions (Act nr 401 of 13 December 1989) because the activity was governed by UK law. Therefore the Italian legal prohibition was not applicable. In addition, and going against the jurisprudence of the European Court of Justice, the court held that the restriction of a UK authorized activity was against the principles of the internal market. In the appeal procedure, the Court of Ascoli Piceno (Italy) requested a preliminary ruling on the compatibility of Act nr 401 and Article 49 of the EC Treaty. A ruling is expected by mid 2003.

Thibault Verbiest and Giovanni Maria Riccio, *Jeux et loteries sur Internet: un vent de libéralisation souffle en Europe*, November 28, 2000, available at <http://www.droit-technologie.org>.

<sup>51</sup> See notably the 1998 Helsinki Declaration of the Gaming Regulators European Forum, available at <http://www.gref.net>.

<sup>52</sup> See EU Institutions press releases, IP (92)1120, December 23, 1992.

<sup>53</sup> Cf., EU Institutions press releases, IP (92) 1120, December 23, 1992. See also Coopers & Lybrand Europe, *Gambling in the Single Market—A Study of the Current legal and Market Situation* (1991).

<sup>54</sup> See Written Question E-1190/98 of John Cushman, April 29, 1998 and the answer given on July 13, 1998 on behalf of the Commission.

<sup>55</sup> Communication from the Commission to the Council and the European Parliament: An Internal Market Strategy for Services, Brussels, December 29, 2000, COM(2000) 888 final.



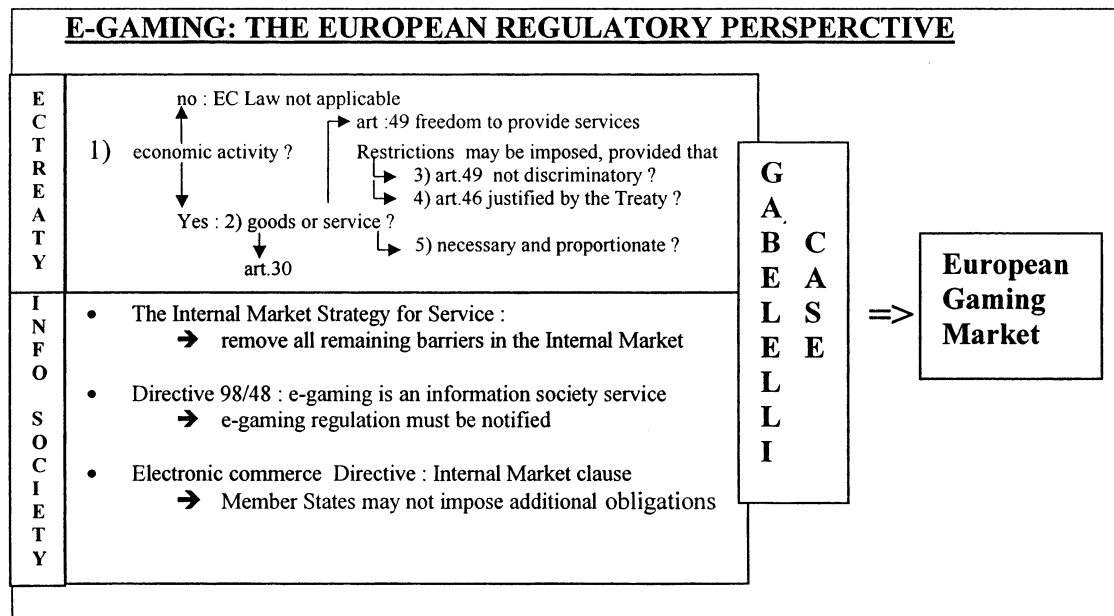


FIG. 1. E-gaming: The European regulatory perspective (by the author).

been delayed,<sup>56</sup> it is clear that, according to this philosophy, Member States will have to open their national borders to operators from other Member States. Sooner or later, this general movement should logically include cross-border gaming. But it will certainly not be accomplished without strong guarantees that Member States may continue to exercise control over the operations occurring on their soil.

#### *Information Society Services*

In the second place, one should consider the proper nature of e-gaming activities.

Following the constant jurisprudence of the EC Court, the provision of gaming activities has to be considered a service.<sup>57</sup>

By virtue of Directive 1998/34/EC, as amended by Directive 98/48/EC,<sup>58</sup> e-games can be considered services of the information society, as they are: i) normally provided for remuneration at a distance; ii) conducted by electronic means; and iii) executed at the individual request of a recipient of services, for instance, the gambler.

Nevertheless, the Directive sets out a double exclusion. On the one hand, two categories of services are excluded from its scope of application: first, services that do not respond to the three aforementioned constitutive elements, for

example, the services enumerated in Annex V of the Directive;<sup>59</sup> and second, the service must meet the definition set forth in Article 50 of the EC Treaty. Services provided by a Member State without any economic consideration in the context of its duties—in particular in the social, cultural, educational and judicial fields—are not covered by the definition given in Article 50 of the EC Treaty and therefore do not fall within the scope of this Directive. As indicated, the European Court of Justice has for-

<sup>56</sup> See Communication from the Commission to the Council and the European Parliament final of the European Commission of 30 July 2002, Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services, presented under the first stage of the Internal Market Strategy for Services, Brussels, July 30, 2002, COM(2002) 441 final.

<sup>57</sup> Cf., *supra*, text accompanying notes 21–26.

<sup>58</sup> Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998, establishing a procedure for the provision of information in the field of technical standards and regulations, Official Journal L 204, 21/07/1998 P. 0037-0048 CONSLEG-98L0034-05/08/1998-33 P, amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, Official Journal L 217, 05/08/1998 P. 0018-0026 CONSLEG-98L0034-05/08/1998-33 P.

<sup>59</sup> E.g., all point to multi-point broadcasting services such as radio and television services, phone and fax services, etc.

mally recognized gaming activities as services.<sup>60</sup>

On the other hand, in addition to the excluded services, some regulations are excluded from its scope of application, notably the regulation of telecommunication services, provided that these services are covered by European law, *in particular* by Directive 90/387/CE.<sup>61</sup>

Once a service is qualified as an information society service, each non-excluded regulatory proposal must be communicated to the Commission.<sup>62</sup>

This notification procedure was put in place to safeguard the free provision of goods<sup>63</sup> and information society services.<sup>64</sup> In this way, if a Member State adopts a restrictive measure, the Commission and the Member States can formulate remarks, softening the restriction.

It is conceivable that Member States, where online gaming organized by private companies is authorized, will criticize proposals imposing a restriction to the freedom to provide services or vice versa.<sup>65</sup>

If a Member State does not notify the Com-

mission, or fails to do so in due time, the regulatory provision will be unenforceable pursuant to the jurisprudence of the European Court of Justice.

Indeed, the EC Court held that the breach of the obligation to notify constitutes a substantial procedural defect such as to render the regulation in question inapplicable, and thus unenforceable against individuals.<sup>66</sup>

Contrary to the Swedish proposal for the modification of the 1994 Lotteries Act,<sup>67</sup> the Belgian 2002 National Lottery Act<sup>68</sup> was enacted by Parliament apparently without notifying the Commission.<sup>69</sup>

### *Directive on electronic commerce*

Finally, Article 3 of the Directive on electronic commerce of June 8, 2000<sup>70</sup> states:

Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in ques-

<sup>60</sup> Cf., *supra* text accompanying notes 27–31, and the jurisprudence of the European Court of Justice, Case C-36/74, Walrave-Koch, o.c.; Case C-13/76, Donà v. Mantero, o.c.; Case C-15/78, Koestler, o.c.; Case C-352/85, Bond van Adverteerders, o.c.

<sup>61</sup> See Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, Official Journal L 192, 24/07/1990 P. 0001-0009.

It should be underlined that in the field of telecommunications the European Institutions are pursuing drastic regulatory modifications. By mid 2003 the new regulatory framework for electronic communications networks and services will be in place. This framework will consist of five harmonization directives of the European Parliament and Council, one liberalization Directive of the Commission and a decision of the European Parliament and Council concerning a Community radio spectrum policy.

<sup>62</sup> Article 8 of Directive 98/34/EC states that Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned,

should knowledge of such text be necessary to assess the implications of the draft technical regulation.

Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.

<sup>63</sup> See Directive 1998/34/EC.

<sup>64</sup> See Directive 1998/48/EC.

<sup>65</sup> See, e.g., the criticism of Denmark regarding the more liberal UK legislation, The National Internet Gaming Strategy of the Danish Ministry of Taxation of 18 June 2001.

<sup>66</sup> See ECJ, Case C-194/94, CIA Security International S.A. v. Signalson S.A., Jur. H.v.J., 1996 ECR I-2201; For the application of this principle in a criminal procedure, see ECJ, Case C-226/97, Johannes Martinus Lemmens, 1998 ECR I-3711.

<sup>67</sup> The proposal concerns the regulation of lotteries effected by means of electromagnetic waves and became effective on August 1, 2002.

<sup>68</sup> Act on the Rationalization of the Functioning and the Management of the National Lottery, 19 April 2002, State Monitor of 4 May 2002.

<sup>69</sup> See Ewout Keuleers, *Online Gaming nearly regulated in Belgium?* February 11, 2002, available at <<http://www.droit-technologie.org>>.

<sup>70</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal L 178, 17/07/2000 P. 0001-0016.

tion which fall within the coordinated field. 2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

This essential provision is also referred to as the internal market clause.

This Directive defines the place of establishment as the place where an operator actually pursues an economic activity through a fixed establishment, irrespective of where websites or servers are situated or where the operator may have a mail box. This definition is in line with the principles established by the EC Treaty and the case-law of the European Court of Justice. Such a definition is designed to remove current legal uncertainty and ensure that operators cannot evade supervision, as they will be subject to supervision in the Member State where they are established.

By virtue of this principle, a virtual casino established and regulated in Spain would be allowed to offer its services to European citizens without being subject to additional requirements or restrictions imposed by other Member States.

Article 1 of the European E-commerce Directive does, however, exclude games "which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions," from the coordinated field.<sup>71</sup> This does not necessarily mean that e-gaming as such is not indirectly regulated by European Law.

However, it can be advocated that in the future the electronic commerce Directive will be applied to or at least will have some kind of influence over the gaming sector.

In the first place, by July 2003, this Directive must be reviewed and if necessary adapted to legal, technical, and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection, and the proper functioning of the internal market.

In view of the aforementioned Internal Market Strategy for Services and the possible evolution within the gaming industry, it could be imagined that this important economic sector

would fall within the coordinated field of the E-commerce Directive.

In the second place and from a more philosophical point of view, it should be underscored that the E-commerce Directive is and will be the legislative foundation upon which future relevant legislation will be enacted.<sup>72</sup> This means that the principles laid down in the Directive should be applicable to all aspects of information society services, including gaming services, or at least have an indicative function.

In the meantime, the German bet-at-home case<sup>73</sup> provides an eloquent example of the current situation.

Due to restrictive German gambling legislation, a German company created an Austrian subsidiary, *www.bet-at-home.com GmbH*, and applied in Austria for an Austrian betting license. After obtaining the required license, the Austrian subsidiary began offering its betting services directly on the site *www.bet-at-home.com*, and indirectly via *www.bet-at-home.de*.

On January 10, 2002 the Hanseatisches Oberlandesgericht, the Hamburg High Court, rejected an appeal against the April 2001 decision of the Hamburg Landesgericht prohibiting a German company from inserting a link to an Austrian online bookmaker, to publicize it, and to divulge relevant information about its activities. The Court of Appeal held that under German law providing gaming services is forbidden, except when properly authorized.

If the company *bet-at-home.com GmbH* provides German consumers the opportunity to

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<sup>71</sup> Article 1 of Directive 2000/31/EC:

#### Objective and scope

This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States. . . . This Directive shall not apply to: . . . the following activities of information society services:

- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions;

<sup>72</sup> See notably the Dutch Bill of 4 February 2002 concerning e-casino games.

<sup>73</sup> See Ewout Keuleers, *Is linking to an online bookmaker illegal?* July 1, 2002, available at <http://www.droit-technologie.org>.

place wagers, then that company is undertaking gaming activities on German soil, for which a German license is required. The mere fact that the server is located outside of Germany is of no importance. What is relevant is that the German market is targeted.

Because no German license was issued, the Austrian company was infringing the German Criminal Code and the German parent company was forbidden to maintain or insert links to the Austrian company, to advertise it, or to provide information about it.

Another example of national case law in this field is the so-called Millions2000 case.<sup>74</sup> In this case, similar to *Schindler*, the Lichtenstein based and authorized International Lottery sought judicial review of the 1976 Lotteries and Amusement Act prohibiting the promotion of nationwide lotteries. It was argued that the UK publicity ban was contrary to the free movement of services as provided for by Articles 49 of the EC Treaty and 36 of the EEA-Treaty.<sup>75</sup> Mr. Justice Moses of the London High Court of Justice dismissed the action, determining that under the 1994 *Schindler* decision of the EC Court such a restriction was justifiable for reasons of social policy and the prevention of fraud.

#### *Towards a European regulatory framework for e-gaming?*

When Advocate General Gulmann<sup>76</sup> assessed the application of the *principle of equivalence* on gaming services, he could not know that similar principles would be inscribed in the E-commerce Directive.<sup>77</sup>

Advocate General Gulmann reasoned: "By virtue of the principle of equivalence, the Member State of destination may not impose additional restrictions to the cross-border provision of services if those services are already subject to the adequate rules of the home state."<sup>78</sup>

Although he considered that this principle was difficult to apply on the facts of the *Schindler* case, its application should prevail over the raised objections.<sup>79</sup>

However, recognizing the necessity to limit the overall supply of gaming services and in the absence of any Community rules in this

field, restrictive measures necessarily had to be implemented separately by each Member State. Therefore A.G. Gulmann concluded that if individual Member States must allow the cross-border provision of gaming services, held in a lawful and proper manner in another Member State, they are denied the opportunity to control the overall supply.

*A contrario*, this would mean that if European rules in the field of gaming activities were adopted, the arguments evoked by Member States to justify the application of restrictive measures, notably the protection of society at large, would lose their relevance.

Considering the borderless nature of e-gaming services and the need to regulate the information society from a higher level than the one of the Member States, the adoption of a European regulatory framework for e-gaming services seems to be appropriate. This Community framework would not only establish the ground principles for the cross-border provision of e-gaming services and harmonize consumer protection in the field of gaming legislation, but would also give Member States a certain degree of flexibility to adopt tailored national measures in compliance with the European framework.

<sup>74</sup> See London High Court of Justice, Queen's Bench Division, 14 June 1999, R v. The Secretary of State for the Home Department ex parte The International Lottery in Liechtenstein Foundation and the Electronic Fundraising Company plc.

<sup>75</sup> Lichtenstein is a member of the European Economic Area.

<sup>76</sup> See *Schindler*, at paragraphs 93–104.

<sup>77</sup> Regarding the internal market clause and the principle of mutual recognition, *cf.*, *supra* text accompanying notes 55–56.

<sup>78</sup> See Case C-205/84, Commission / Germany, 1986 ECR 3755.

<sup>79</sup> This for three reasons. First, the United Kingdom's protection of consumers would be of the same level, irrespective of the characteristics of the game, i.e. small scale lottery, football pool, or national lottery. Second, the protection offered by German law in relation to the Sued-deutsche Klassenlotterie, is of a high degree. Therefore, it cannot be said that there is a greater risk of abuse in connection with that lottery than for other forms of gaming. Finally, if such a risk exists, it does not justify the application of the restrictions imposed by the laws of the country of destination.

### WHAT WILL THE FUTURE BRING?

Nobody can predict the future. However, all things considered, it is possible that Europe is at the advent of an e-gaming breakthrough.

First, although the EC Court has recognized the wide discretionary power of Member States to adopt and enforce restrictive gaming measures, it should be emphasized that the relevant jurisprudence only relates to offline forms of gaming and not to all sorts of e-gaming, *i.e.*, an information society service.

Second, considering the proper nature of e-gaming services, *i.e.*, the borderless character of the information society, national authorities will have to recognize that a restrictive national regulation would remain dead letter if a citizen can log onto a foreign gaming platform with the same convenience as he does a national one.

In this regard Member States have to realize that e-gaming is a unique activity and therefore should benefit from a proper, adequate, and technology-neutral regulatory framework. In the end, the adoption of such a framework is in the best interest of all parties involved. By giving operators an opportunity to operate their services from within their national jurisdiction, they are not forced to establish their servers in remote or exotic overseas places. By doing so, governments can continue to impose taxes on

these activities and relocate the profits thereof. In addition, operators will be able to operate in broad daylight, this in strict compliance with the relevant regulations. Finally, the gambler and even the society at large will benefit from this regulation. Gamblers no longer need to surf to [www.casino.ag](http://www.casino.ag) to play, but can rely on the fact that when they enter [www.casino.it](http://www.casino.it) or [www.casino.dk](http://www.casino.dk), their rights, *e.g.*, privacy and interests, are adequately protected.

Finally, new technologies are fundamentally changing our society. This progress will need to be accompanied by an adequate and open regulatory framework. More and more, the EC Court will have to rule upon pending and future gaming cases taking this framework into consideration.

For these three reasons the adoption of a European regulatory framework in the field of e-gaming activities can be advocated.

When ruling upon the *Gambelli* case, the first European e-gaming case, the EC Court will be confronted with these new dilemmas and paradigms. Therefore, and in light of the foregoing, it is conceivable that the EC Court will deviate from its classical jurisprudence in this field and recognize what is already a reality: a cross-border e-gaming market.

It is probably too soon to cheer, but let the games begin.